

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

MGE Energy, Inc.,  
MGE Power LLC, and  
MGE Power Elm Road LLC

Docket No. EL04-136-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER AND  
DISCLAIMING JURISDICTION

(Issued November 19, 2004)

1. In this order, we grant a petition for a declaratory order, finding that certain passive lessors would not, because of a lease financing transaction, become subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).<sup>1</sup>

**I. Background**

2. On September 23, 2004, MGE Energy, Inc. (MGE Energy), MGE Power LLC (MGE Power), and MGE Power Elm Road LLC (MGE Power Elm Road) (collectively, Petitioners) filed a petition for a declaratory order, asking that the Commission find that certain passive lessors would not, because of a lease financing transaction, become subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).

3. MGE Energy is a public utility holding company that is exempt from registration under section 3(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA),<sup>2</sup> because it is predominantly an intrastate holding company. The Petitioners state that MGE Energy does not directly own or control any facilities used for the generation, transmission, or distribution of electric energy. MGE Energy has several wholly-owned

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<sup>1</sup> 16 U.S.C. § 824 (2000).

<sup>2</sup> 15 U.S.C. § 79c(a)(1) (2000).

subsidiaries, including Madison Gas and Electric Company (MGE), MGE Power, and MGE Power West Campus LLC (MGE Power West Campus), MGE Power Elm Road, MGE Construct LLC (MGE Construct), Central Wisconsin Development Corp. (CWDC) and MAGAEL, LLC (MAGAEL).

4. MGE Power is a wholly-owned subsidiary of MGE Energy formed to hold the unregulated assets of MGE Energy. MGE Power Elm Road is an indirect wholly-owned subsidiary of MGE Energy formed to own the generating assets of the Elm Road Facility, described below.

5. Petitioners state that the Elm Road Facility was proposed in conjunction with the “Power the Future” application filed at the Public Service Commission of Wisconsin (Wisconsin Commission) by Wisconsin Energy Corporation. The Elm Road Facility will consist of two 615 MW super critical pulverized coal generating units located in Oak Creek, Wisconsin. MGE Power Elm Road intends to acquire ownership of approximately 8.33 percent of the Elm Road Facility. MGE Power Elm Road will lease its interest in the Elm Road Facility to MGE through a long-term lease (Facility Lease Agreement) approved by the Wisconsin Commission (Elm Road Transaction). Petitioners state that MGE Power Elm Road will own but will not operate the Elm Road Facility. Pursuant to the long-term lease, MGE will operate and maintain the Elm Road Facility, but this will be done through an Operating and Maintenance Agreement with the Wisconsin Electric Power Company (WEPCO), under which WEPCO is appointed as the operator of the Elm Road Facility on MGE’s behalf. MGE will pay its share of operating costs under the Operating and Maintenance Agreement. Construction of the Elm Road Facility will begin in 2005, and is scheduled to be completed by 2010 for Unit 1 and 2011 for Unit 2.

6. In short, MGE Power Elm Road will have a minority, undivided ownership interest in the Elm Road Facility, and MGE Power Elm Road will lease its interest in the Elm Road Facility to MGE for an initial term of 30 years pursuant to the terms of the Facility Lease Agreement.

7. Once the lease provisions become effective, MGE will make fixed monthly rental payments to MGE Power Elm Road for the term of the Facility Lease Agreement. In return, MGE will have the right to possess and operate MGE Power Elm Road’s interest in the Elm Road Facility (which, as noted above, will be accomplished through the Operating and Maintenance Agreement with WEPCO).

8. According to Petitioners, neither MGE Power Elm Road nor its parents, MGE Power and MGE Energy, will operate or control the Elm Road Facility. At the end of the term of the Facility Lease Agreement, MGE may, at its option, renew the lease for a renewal term determined under the terms of the Facility Lease Agreement, buy the leased

facilities outright from MGE Power Elm Road, or return the leased facilities to MGE Power Elm Road in good condition. Petitioners state that upon the occurrence of certain events of default, MGE Power would have the right to terminate the Facility Lease Agreement and take possession of the 8.33 percent interest in the Elm Road Facility.

9. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 60,385 (2004), with comments, protests and interventions due on or before October 22, 2004. On October 22, 2004, WEPCO filed a motion to intervene.

## II. Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene serves to make WEPCO a party to this proceeding.

11. Petitioners request a disclaimer of jurisdiction over passive lessors (MGE Energy, MGE Power, and MGE Power Elm Road), *i.e.*, a determination that they will not be regarded as "public utilities" as that term is defined in section 201 of the FPA.<sup>3</sup>

12. Section 201(b) of the FPA states that:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . . . The Commission shall have jurisdiction over all facilities used for such transmission or sale of electric energy. . . .

13. Section 201(e) of the FPA, in turn, states that:

The term "public utility" . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. . . .

14. The application of section 201 of the FPA to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>4</sup> The Commission uses a two-step analysis for determining whether a financial interest in

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<sup>3</sup> The lessee, MGE, we note, is a public utility. *See Madison Gas and Electric Co., et al.*, 106 FERC ¶ 61,098 at P 4, 20 (2004).

<sup>4</sup> *See Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996).

jurisdictional facilities constitutes sufficient ownership that holding such an interest would result in a finding of “public utility” status under the FPA. Under this precedent, the Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of producing or selling electric power. The Commission has concluded that it would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities and subject them to the Commission’s jurisdiction where these participants hold only equitable or legal title to the electric facilities and are removed from the operation of the facilities and the sale of power.

15. Petitioners state that the passive lessors: (1) will not operate, control operation, or exercise decision-making authority over jurisdictional facilities; and (2) will not engage in the generation, transmission, or distribution of electric energy. In light of the facts presented in the petition and consistent with Commission precedent, we find that the role of the passive lessors, as contemplated in the proposed lease financing arrangement, is limited to that of passive investors that do not exercise control or decision-making authority over the leased facilities. Accordingly, none of the passive lessors, as long as they operate in a manner consistent with the representations in the petition, will, as a result of the transaction described above, be a public utility within the meaning of section 201(e) of the FPA.<sup>5</sup>

16. Moreover, the provisions in the Facility Lease Agreement regarding what may occur in the event of default and lease expiration do not change the conclusion that the passive lessors are not public utilities under section 201(e) of the FPA.<sup>6</sup> These lease provisions, as represented in the petition, are not a present assignment of rights to the passive lessors that would subject them to jurisdiction under section 201.

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<sup>5</sup> If this changes so that the passive lessors operate the facilities in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they will become public utilities and will be required to make appropriate filings pursuant to section 205 of the FPA, 16 U.S.C. § 824d (2000). *See, e.g., Unicom Investments, Inc.*, 91 FERC ¶ 61,109 at 61,387 n.9 (2000).

<sup>6</sup> *See Wisconsin Energy Corp., et al.*, 105 FERC ¶ 61,029 at P 14 (2003) (finding that passive lessors in a similar long-term lease transaction, with similar default and lease expiration provisions, were passive investors and not public utilities under section 201).

**The Commission orders:**

Petitioners' request that based on the facts presented by Petitioners in their petition, the Commission disclaim jurisdiction over the passive lessors is hereby granted.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.